

**BEFORE THE FEDERAL ELECTION COMMISSION**

In the matter of

Apple Health Care, Inc.,

Respondent.

MUR 6522

**RESPONSE OF APPLE HEATH CARE, INC.  
TO THE COMPLAINT IN MUR 6522**

On behalf of our client, Apple Health Care, Inc. ("Respondent"), we hereby respond to the notification from the Federal Election Commission that a complaint was filed against it in the above-referenced matter. The complaint, filed by Sean Murphy, alleges that Respondent is "potentially" violating federal election law by candidate Lisa Wilson-Foley having been prominently featured in Apple Rehab commercials on You Tube, and possibly another advertisement on Fox News. The allegations contained in the complaint have no basis in fact or law. Accordingly, we request that the Commission dismiss the Complaint, take no further action and close the file.

**ANALYSIS**

**I. Introduction.**

Specifically, the complaint alleges that Respondent made an in-kind contribution to Lisa Wilson-Foley's congressional campaign through two commercial advertisements on the Internet. Both of Respondent's Internet communications mentioned in the complaint are fee-less website communications on www.youtube.com, which are exempt from the Commission's coordinated communications regulations. The Apple Rehab advertisement allegedly on Fox News was not coordinated on two other separate grounds: (1) they were placed outside the 90-day pre-election window applicable to public communications referencing congressional candidates that would otherwise satisfy the regulations' content standard; and (2) they were exempt under the regulations' safe harbor for commercial advertisements.

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**II. The Communications Discussed In The Complaint Do Not Satisfy The Content Standards Under The Commission's Coordination Regulations And, Therefore, Do Not Constitute Coordinated Communications.**

A communication sponsored by a third-party is "coordinated" with a candidate or their authorized committee and treated as an in-kind contribution to that candidate only if the communication satisfies the Commission's three-prong test under the Commission's coordination regulations.<sup>1</sup> Only "public communications" are included within the "content standards", which is one element that must be satisfied in order for a communication to be eligible for analysis under the Commission's coordination regulation.<sup>2</sup> The content standard actually serves as a filter to determine whether the Commission's coordination regulations even apply to a specific communication.<sup>3</sup> If a communication does not satisfy the content standard prong, it is not considered a "coordinated communication" with a candidate or their authorized committee.<sup>4</sup>

Commission regulations specifically provide that a "public communication" does not include Internet communications unless they were placed for a fee on another person's website:

*Public communication* means a by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising. The term general public political advertising shall not include communications over the Internet, except for communications placed for a fee on another person's Web site.<sup>5</sup>

The You Tube communications cited by complainant are not "public communications" as they were all distributed on the Internet without a fee. As the www.youtube.com communications mentioned

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<sup>1</sup> 11 C.F.R. §§ 109.21(a) & (b).

<sup>2</sup> § 109.21(c).

<sup>3</sup> See 68 Fed. Reg. 421, 426 ("The Commission notes that the inclusion of one prong of its test, the content standard, could function efficiently as an initial threshold for the coordination analysis.").

<sup>4</sup> *Id.* ("For a communication to be 'coordinated,' all three prongs of the test must be satisfied.").

<sup>5</sup> 11 C.F.R. § 100.26.

in the complaint do not constitute "public communications," they do not satisfy the content standard under the coordination regulations.<sup>6</sup> Thus, the content standard is not met and no violation occurred.

**III. Even If The Communications At Issue Satisfied The Definition Of "Public Communication," They Still Do Not Constitute Coordinated Communications Because The Communications Do Not Satisfy The Content Standard Prong.**

Furthermore, even if the You Tube videos were broadcast on television or cable -- as the possible Fox News commercial advertisement was -- and, therefore, satisfied the definition of "public communications", they were not distributed within 90 days of an election. Public communications that merely refer to a House or Senate candidate and do not republish campaign materials, expressly advocate the election or defeat of a federal candidate, or contain content that constitutes the functional equivalent of express advocacy, do not meet the content standards of the Commission's coordinated communications regulations if they are publicly distributed or disseminated outside this 90-day pre-election window.<sup>7</sup>

Lisa Wilson-Foley is a candidate for the House of Representatives in Connecticut's 5<sup>th</sup> Congressional District.<sup>8</sup> Connecticut's primary election is August 14, 2012 and the Republican congressional conventions were held on May 18, 2012 -- more than 90 days after the complaint was filed and the communications were alleged to have been distributed.<sup>9</sup> The website communications on You Tube, therefore, do not satisfy the content standard even if they were considered "public communications". The same is true of the possible Apple Rehab advertisement on Fox News, which also is alleged to have been aired more than 90 days before an election.

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<sup>6</sup> 71 Fed. Reg. 18599 ("To be a 'coordinated communication' . . . a communication must be a 'public communication' as defined by 11 C.F.R. § 100.26.").

<sup>7</sup> § 109.21(c)(4)(i).

<sup>8</sup> <http://query.nictusa.com/cgi-bin/fecimg/?H2CT05149>.

<sup>9</sup> [http://www.fec.gov/info/charts\\_primary\\_dates\\_2012.shtml](http://www.fec.gov/info/charts_primary_dates_2012.shtml).

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Finally, even if the communications at issue had been both "public communications" and disseminated within 90 days of the August 14<sup>th</sup> primary election, the Commission's regulations exempt advertisements promoting commercial transactions in which the identified federal candidate appears only in their capacity as the owner or operator of a business that existed prior to the candidacy, and so long as the (1) medium, timing, content and geographic distribution of the public communications is consistent with advertisements made prior to the candidacy; and (2) the public communication does not promote, attack, or oppose that candidate or an opponent.<sup>10</sup>

No evidence was presented that the website communications at issue or the possible Fox News advertisement varied from those placed on the Internet prior to her candidacy. And, far from promoting, attacking or opposing Ms. Wilson-Foley or an opponent, these communications did not promote her in any manner or even mention another person who could otherwise be attacked or opposed. These clearly commercial advertisements were, therefore, exempt from the Commission's coordinated communications regulations even if they had not been otherwise exempt as (1) an Internet communication and (2) one disseminated outside the 90-day pre-election window.

### CONCLUSION

The allegations contained in the complainant – that commercial advertisements constitute in-kind contributions to the Foley campaign – do not constitute violations under the Act or Commission regulations. Commissioners Wold, Mason, Thomas, Statement of Reasons, MUR 4856 ("A mere conclusory accusation without any supporting evidence does not shift the burden of proof to respondents. . . . The burden of proof does not shift to a respondent merely because a complaint is filed."); Commissioners Mason, Sandstrom, McDonald, Smith, Thomas, Wold, Statement of

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<sup>10</sup> § 109.21(i); see also 75 Fed. Reg. 55959 ("The safe harbor excludes from the definition of coordinated communication any public communication in which a Federal candidate is clearly identified only in his or her capacity as the owner or operator of a business that existed prior to the candidacy, so long as the public communication does not PASO that candidate or another candidate who seeks the same office, and so long as the communication is consistent with other public communications made by the business prior to the candidacy in terms of the medium, timing, content, and geographic distribution.").

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Reasons, MUR 5141 ("A complainant's unwarranted legal conclusions from asserted facts, will not be accepted as true."). Also, the complaint's speculative accusations about the You Tube communications are not a sufficient basis for finding reason to believe -- especially in the instant matter where there is no theory under the Commission's coordination regulations for finding a possible violation. Commissioners Mason, Sandstrom, Smith, Thomas, Statement of Reasons, MUR 4972 ("Mere speculation will not support an RTB finding."); Commissioners Mason, Sandstrom, Smith, Thomas, Statement of Reasons, MUR 4960 ("Such purely speculative charges, especially when accompanied by a direct refutation, do not form an adequate basis to find reason to believe that a violation of the FECA has occurred.").

For all the reasons stated above, there is no factual or legal basis for finding reason to believe in this matter. We respectfully request that the Commission dismiss the complaint, close the file, and take no further action in this matter.

Sincerely,



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